INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes and rule involved	2
Statement	4
Argument	12
Conclusion	17

CITATIONS

Cases:

Ferguson v. *Union Nat. Bank of Clarksburg, W. Va.*, 126 F. 2d 753	13
Garden Homes, Inc. v. *District Court of Somerville*, No. 11,881, 146 N. E. 2d 372	8
Garden Homes, Inc. v. *Mason*, 142 F. Supp. 744	10
Garden Homes, Inc. v. *Mason*, 200 F. 2d 299	5
Garden Homes, Inc. v. *Mason*, 207 F. 2d 459	6
Garden Homes, Inc. v. *Mason*, 238 F. 2d 651	8, 13, 14
Garden Homes, Inc. v. *Mason*, 238 F. 2d 654	10, 16
George H. Evans & Co. v. *United States*, 169 F. 2d 500	13
Handy Cafe, Inc. v. *Justices of the Superior Court*, 248 F. 2d 485, pending on petition for a writ of certiorari, No. 748, Oct. T. 1957	8
James River Apartments, Inc. v. *Federal Housing Administration*, 136 F. Supp. 24	13, 14
Machine Tool & Equipment Corp. v. *R. F. C.*, 131 F. 2d 547	14
MacNeil v. *United States*, 236 F. 2d 149, certiorari denied, 352 U. S. 912	6, 7
MacNeil Bros. Co. v. *Justices of the Superior Court*, 242 F. 2d 273, certiorari denied, 355 U. S. 805	8
Perpetual Building & Loan Ass'n., et al. v. *Series Directors, et al.*, 217 F. 2d 1, certiorari denied, 349 U. S. 911	14
Sibin v. *H. O. L. C.*, 147 F. 2d 653, certiorari denied, 326 U. S. 759	14

Cases—Continued

	Page
Sarner v. *Mason*, 228 F. 2d 176, certiorari denied, 351 U. S. 924	14
United States v. *Garden Homes, Inc.*, 113 F. Supp., affirmed, 210 F. 2d 281	5, 10
Statutes:	
National Housing Act, 48 Stat. 1246, as amended, 12 U. S. C. 1702, *et seq*	2, 5
49 Stat. 722, 12 U. S. C. 1702	13
62 Stat. 930, 28 U. S. C. 1331	3, 14
62 Stat. 930, 28 U. S. C. 1332	3, 13
62 Stat. 937, 28 U. S. C. 1441	3, 12
62 Stat. 937, 28 U. S. C. 1441 (a)	3
62 Stat. 937, 28 U. S. C. 1441 (b)	3
62 Stat. 938, 28 U. S. C. 1442 (a) (1)	4
Tucker Act, 28 U. S. C. 1346 (a) (2)	13
12 U. S. C. 1463 (a)	14
12 U. S. C. 1716 (c)	14
15 U. S. C. 603 (a)	14
40 U. S. C. 308	9
40 U. S. C. 309	9
Miscellaneous:	
Federal Rules of Civil Procedure:	
Rule 41	11
Rule 41 (b)	4, 11
Rule 60 (b)	17
Rule 73 (c)	16
Hart & Wechsler, *The Federal Courts and the Federal System* (1953), 1147–1148	15
Rules of Civil Procedure of the United States District Court for the District of New Hampshire, Rule 4	9

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 749

GARDEN HOMES, INC., PETITIONER

v.

NORMAN P. MASON, COMMISSIONER, FEDERAL HOUSING ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the United States District Court for the District of New Hampshire (R. 24)[1] dismissing petitioner's complaint is not reported. The opinion of the United States Court of Appeals for the First Circuit (Pet. App. B 10–13) is reported at 249 F. 2d 71.

[1] "R. —" references are to the record appendices in *Garden Homes, Inc.* v. *Mason*, C. A. 1, No. 5262; "R. App. —" references are to the record appendices in an earlier appeal by petitioner (C. A. 1, No. 5110) which was incorporated by reference (R. 34) in C. A. 1, No. 5262. Both record appendices are on file in this Court.

JURISDICTION

The judgment of the Court of Appeals was entered on October 25, 1957 (R. 43). By order of Mr. Justice Frankfurter, dated January 22, 1958, the time to file a petition for a writ of certiorari was extended to and including January 27, 1958. The petition for a writ of certiorari was filed on January 27, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether an action brought in a state court against the Federal Housing Commissioner, based upon an alleged breach of contract in the course of administration of the National Housing Act, was properly removable to the federal district court.

2. Whether, in the circumstances of the present case, the district court abused its discretion in dismissing, with prejudice, petitioner's complaint.

STATUTES AND RULE INVOLVED

1. The National Housing Act, 48 Stat. 1246, as amended, 12 U. S. C. 1702, provides in relevant part:

> The President is authorized to create a Federal Housing Administration, all of the powers of which shall be exercised by a Federal Housing Commissioner (hereinafter referred to as the "Commissioner"), who shall be appointed by the President, by and with the advice and consent of the Senate. * * * The Commissioner shall, in carrying out the provisions of this subchapter and subchapters II, III, VI–VIII, and X of this chapter, be authorized, in his official capacity, to sue and be sued in any

court of competent jurisdiction, State or Federal.

2. 62 Stat. 930, 28 U. S. C. 1331, provides:

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.

3. 62 Stat. 930, 28 U. S. C. 1332, provides in relevant part:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:
>
> (1) Citizens of different States; * * *

4. 62 Stat. 937, 28 U. S. C. 1441, provides in relevant part:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties

in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

5. 62 Stat. 938, 28 U. S. C. 1442, provides in relevant part:

> (a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Any officer of the United States or agency thereof, or person acting under him, for any act under color of such office * * *.

6. Rule 41 (b) of the Federal Rules of Civil Procedure provides in relevant part:

> * * * Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

STATEMENT

1. *Background:*—It may be helpful to the Court to set forth the pertinent background litigation involving petitioner, its president and counsel, Angus M. MacNeil, and the Government, which bears upon the present case. On August 10, 1949, petitioner executed a note and mortgage to the Worcester Federal Savings and Loan Association of Worcester, Massachusetts for $1,252,009, pledging, among other things, certain New Hampshire real estate as security. Petitioner thereafter defaulted on its payments, and,

pursuant to the terms of the note, the bank declared payable the principal and interest due. Since the loan had beeen insured under the National Housing Act, 48 Stat. 1246, as amended, 12 U. S. C. 1703, the bank assigned the note and mortgage to the Federal Housing Administration. The United States commenced foreclosure proceedings in the United States District Court for the District of New Hampshire, and, on June 18, 1953, the district court, upon a finding of clear default, ordered foreclosure. *United States* v. *Garden Homes, Inc.*, 113 F. Supp. 415 (D. N. H.), affirmed, 210 F. 2d 281 (C. A. 1). Prior to the conclusion of the action in the district court, petitioner had taken an appeal challenging the district court's appointment of a receiver to operate and manage the property as well as to collect rents and profits therefrom. The Court of Appeals held that an insufficient showing had been made to warrant the appointment of a receiver to operate and manage the property and that sufficient protection was afforded if the receiver collected the rents and profits of the property. *Garden Homes, Inc.* v. *United States*, 200 F. 2d 299 (C. A. 1). On remand, the district court appointed a receiver to collect all rents and profits and ordered him to pay to petitioner all necessary expenses for maintenance of the property. Petitioner immediately appealed from this order and argued that it should be allowed to collect the rents and profits, and, after payment of expenses, turn over the net proceeds to the receiver. The Court of Appeals found "no support in reason or authority for this proposition" and affirmed the order of the dis-

trict court. *Garden Homes, Inc.* v. *United States*, 207 F. 2d 459 (C. A. 1). Thereafter, upon petitioner's plea that it was a hardship to require it to pay expenses in the first instance, the district court, on September 17, 1953, ordered the receiver to pay petitioner's expenses upon presentation, if it appeared that such expenditures were proper. At a hearing held on June 27, 1955, upon the receiver's final report, the court's attention was directed to MacNeil's failure to disburse to petitioner's creditors funds paid to him for that purpose by the receiver. The court ordered MacNeil to produce the money in court within 20 days, and, subsequently, after notice and hearing, MacNeil was adjudged guilty of civil and criminal contempt for his failure to comply with the court's order. On August 10, 1956, the Court of Appeals affirmed the judgment of criminal contempt but reversed the finding of civil contempt. *MacNeil* v. *United States*, 236 F. 2d 149 (C. A. 1). MacNeil's petition for certiorari was denied by this Court, 352 U. S. 912.[2]

[2] After the mandate reached the district court, MacNeil was ordered to pay his fine ($400) within 48 hours. MacNeil did not comply, and, on January 3, 1957, the district court issued to the Marshal for the District of New Hampshire a bench warrant ordering the apprehension of MacNeil. On January 4, 1957, the United States Marshal for the District of Massachusetts, Ralph W. Gray, executed the warrant by having one of his deputies arrest MacNeil in the corridor of the courthouse of the Massachusetts District Court for the District of Somerville. MacNeil was conveyed to Concord, New Hampshire and surrendered to the New Hampshire Marshal on the same day. Thereafter, MacNeil brought suit against Gray in the Superior Court of the County of Suffolk, Commonwealth of Massachusetts, alleging abuse of process and false

2. *This litigation:*—Alleging that the foreclosure pro- (*supra*, p. 5) were caused by a breach of con- defendant or his predecessor in office" petitioner, in a complaint filed on July 28, 1955, in the Superior Court of Hillsborough County in New Hampshire, sought to recover the sum of one million dollars (R. App. 9–10).[3] The complaint named as defendant "Norman P. Mason of Washington, D. C., as Acting Commissioner of the Federal Housing Administra-

arrest. The suit was removed to the United States District Court for the District of Massachusetts, and, on January 2, 1958, Judge Wyzanski granted the Government's motion for summary judgment. *Angus M. MacNeil* v. *Ralph W. Gray*, Civil Action No. 57–931–W. On January 27, 1958, MacNeil filed a notice of appeal.

[3] Petitioner alleged, *inter alia*, that (R. App. 9–10): "the defendant, or his predecessor in office, did fail to perform the terms of said agreement by refusing and failing to furnish the guaranteed payments at the times and in the amounts provided for in said agreement, although the plaintiff performed its part of said agreement, thereby causing the plaintiff to be diversed of the legal title of said real estate through foreclosure proceedings wherein the rights of the plaintiff herein against said defendant, or his predecessor in office, for the breach of said agreement could not be and were not adjudicated, and as a result of said foreclosure the legal title to said real estate was acquired by the defendant, or his predecessor in office, as appears in the records at said Hillsborough County Registry of Deeds, at a price which did not reflect the true value of said real estate, thereby destroying the economic security and stability of the plaintiff's housing project on said real estate; depriving the plaintiff of its use and possession of property; causing the plaintiff to incur great financial loss and damage; and placing the credit and business reputation of the plaintiff in jeopardy, contrary to the covenant of the defendant, or his predecessor in office, aforesaid; and so the defendant, or his predecessor in office, his covenant has not kept, but has broken the same, all to the damage of the plaintiff as it says, in the sum of One Million Dollars."

tion" and jurisdiction was obtained by attachment in Hillsborough County, New Hampshire, of various real estate owned by the Government and held by the Commissioner in his official capacity (R. 9–10).[4]

On October 17, 1955, upon petition of the Government, the action was removed to the United States District Court for the District of New Hampshire (R. App. 7). The Government then filed, on Decem-

[4] On August 9, 1955, petitioner also initiated a similar action entitled "*Garden Homes, Inc.* v. *Norman P. Mason*, as he is Commissioner of Federal Housing Administration" in the District Court of Somerville, a District Court of the Commonwealth of Massachusetts. That action was removed by the Government to the United States District Court for the District of Massachusetts. The district court thereafter granted the Government's motion to dismiss based upon petitioner's failure to secure effective service. (Service had been attempted by leaving a copy of the summons under the door of Mason's personal residence in Chelmsford, Massachusetts.) The Court of Appeals affirmed the dismissal. *Garden Homes, Inc.* v. *Norman P. Mason*, 238 F. 2d 651 (C. A. 1). Petitioner then sought to have defendant Mason defaulted in the Somerville District Court. The state court (Brine, J.) refused to grant petitioner's motion to default after being apprised of the removal proceedings. Petitioner then brought suit for a writ of certiorari against Judge Brine urging that his action be corrected. A motion for the issuance of an order of notice on this writ of certiorari was denied by the Superior Court for the County of Middlesex, which denial was affirmed on petitioner's appeal to the Supreme Judicial Court of the Commonwealth of Massachusetts. *Garden Homes, Inc.* v. *District Court of Somerville*, No. 11,881, decided December 4, 1957, 146 NE. 2d 372 (Supreme Judicial Ct. Mass.).

(For other litigation involving petitioner's counsel and justices of the Commonwealth of Massachusetts, see *Handy Cafe, Inc.* v. *Justices of the Superior Court*, 248 F. 2d 485 (C. A. 1), pending on petition for a writ of certiorari, No. 748, Oct. T. 1957; *MacNeil Bros. Co.* v. *Justices of the Superior Court*, 242 F. 2d 273 (C. A. 1.), certiorari denied, 355 U. S. 805.)

ber 5, 1955, a motion to vacate the attachment,[5] which was taken under advisement by the district court (R. App. 19). Thereafter, petitioner filed on December 12, 1955, a "motion to strike the petition for removal" (R. App. 28); on December 13, 1955, a "motion to strike petition to remove action" (R. App. 27); on January 3, 1956, a "petition for restraining order and injunction" (R. App. 26–27); and, on January 3, 1956, a "request for immediate remand and for abstention of action" (R. App. 37–38). Petitioner's motions came on for hearing on March 12, 1956 (R. App. 3–4). However, petitioner's counsel failed to appear and, on the next day, petitioner's motions were denied by the district court (R. App. 4).[6] On March

[5] The motion was based upon 40 U. S. C. 308 and 309. Section 308 provides that, when any property in which the United States may have an interest shall in any judicial proceeding be attached as security for any claim made against such property, the Secretary of the Treasury may cause a stipulation to be entered by the proper district attorney for the discharge of such property from attachment stating that, upon such discharge, the person asserting the claim against the attached property shall become entitled to all the benefits of Sections 308 and 309. The latter section provides the procedure for the payment of claims pursuant to a formal judgment in such a proceeding. The Government's motion was accompanied by a stipulation, filed upon instruction of the Acting Secretary of the Treasury, to the effect that, upon discharge of the attachment, petitioner would become entitled to all the benefits of 40 U. S. C. 308 and 309 (R. App. 18).

[6] Petitioner's counsel, who was not a member of the bar of the District of New Hampshire, was repeatedly advised by the court that, under the court's rules, he was required to associate with a member of the bar of the district. *Rule 4 of the Rules of Civil Procedure of the United States District Court for the District of New Hampshire.* Petitioner consistently re-

23, 1956, the Government's motion to vacate the attachment was granted (R. App. 6). See *Garden Homes, Inc.* v. *Mason*, 142 F. Supp. 744 (D. N. H.). An attempted appeal by petitioner from the denial of his various motions was dismissed for lack of jurisdiction. *Garden Homes, Inc.* v. *Mason*, 238 F. 2d 654 (C. A. 1).[7]

On January 14, 1957, the district court ordered the case set for trial on March 4, 1957 (R. 2). By letter to the petitioner dated February 18, 1957, the clerk of the district court reaffirmed the trial date of March 4, 1957, notwithstanding, so the letter recited, that the clerk had received a telephone call from petitioner's attorney that he could not be present on that date (R. 30). However, the district court relented, and by letter dated February 26, 1957, the clerk advised petitioner that the trial had been postponed to 11:00 a. m. on March 5, 1957 (R. 21). By letter dated March 1, 1957, petitioner was informed of a second postponement of the trial to 11:00 a. m. on March 6, 1957 (R. 32).

---

fused to comply with this requirement. (See *United States* v. *Garden Homes, Inc.*, 113 F. Supp. 415 (D. N. H.); see, also, R. App. 40.)

[7] During the pendency of that appeal, petitioner filed another motion to remand which was denied by the Court of Appeals. Also pending appeal, and after filing its brief, petitioner filed a "motion for leave to file motion for discontinuance without prejudice in the district court." Petitioner later requested the clerk to withhold submission of this motion to the court. The Government asked for, and was given, an extension of time within which to file its brief, since a granting of petitioner's motion would have obviated the necessity of a Government brief on appeal. Petitioner thereafter withdrew its motion.

Meanwhile, petitioner had filed on February 21, 1957, a "motion for remand" and a "motion to decline jurisdiction" (R. 2, 4–7, 9–10); and, on February 26, 1957, a "motion to remand for lack of jurisdiction" and a "motion for remand for reasons of the law of the case" (R. 2, 10–13, 13–16). On March 2, 1957, petitioner filed another "motion for remand" and a "motion for the taking of judicial notice" (R. 2, 16–19); and on March 4, 1957, still another "motion for remand" and another "motion of plaintiff for taking of judicial notice" was filed (R. 2, 19–22).

At the time and date set for trial, no one appeared on behalf of petitioner. The Government thereupon orally moved to dismiss with prejudice under Rule 41 of the Federal Rules of Civil Procedure, and this motion was granted by the district court (R. 2). During the afternoon, the clerk of the court received a letter from petitioner's counsel, dated March 5, 1957, stating that he could not be present at the trial which had been set for that morning as he would be appearing before the Supreme Judicial Court of Massachusetts (R. 33).[8] On March 14, 1957, the district court entered a formal judgment of dismissal (R. 24) which, because it did not specify that it was without prejudice, "operates as an adjudication upon the merits." Fed. R. C. P. 41(b), *supra*, p. 4.

[8] The letter states that it was "[i]n accordance with previous advice sent to you"; however, there is nothing in the files or record of the district court indicating that such "previous advice" had been sent.

The Court of Appeals affirmed (R. 43). It noted that (R. 41) "[u]nder the circumstances, considering also other instances in the case of failure diligently to prosecute, as pointed out by appellee, we cannot say that the district court abused its discretion in dismissing the complaint." Petitioner's other contentions on appeal, which were addressed to an alleged lack of jurisdiction in the lower court, were also rejected by the Court of Appeals (R. 41–42).

ARGUMENT

Petitioner's essential contention is that "the case was removed without right" from the state court to the federal district court (Pet. 6). There are at least three separate and proper bases for removal in this case—any one of which is a complete answer to petitioner's contention. Petitioner's other argument, *i. e.*, "the dismissal should have been, at most, one without prejudice" (Pet. 7), was properly rejected by the Court of Appeals because, after consideration of the circumstances and history of this drawn-out litigation, it was of the unanimous view that the district court had not abused its discretion. Further review by this Court is not warranted.

1. Under the general removal statute, 62 Stat. 937, 28 U. S. C. 1441, *supra*, p. 3, "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant * * * to the district court of the United States for the district and division embracing the place where such action is pending." Clearly, petitioner's complaint in the state

court, which set forth a claim in the sum of one million dollars against the Federal Housing Commissioner for an alleged breach of contract in the course of his administration of the National Housing Act, could have originally been brought in the district court.

In the first place, it could have been brought under 28 U. S. C. 1332, *supra*, p. 3, as involving, between citizens of different states, an amount in controversy clearly in excess of $3,000.[9] It is apparent that the complaint disclosed a case of diversity of citizenship since petitioner is a citizen of Massachusetts, and, for purposes of diversity, the Federal Housing Administration is treated as a citizen of the District of Columbia. *Garden Homes, Inc.* v. *Mason*, 238 F. 2d 651, 653 (C. A. 1); *James River Apartments, Inc.* v. *Federal Housing Administration*, 136 F. Supp. 24 (D. Md.). Petitioner insists here (Pet. 4), as it did in the courts below, that the suit is one against the Commissioner in his individual capacity, and, since the Commissioner is also a citizen of Massachusetts, diversity is lacking. However, the plain fact is that petitioner's complaint named as defendant "Norman P. Mason of

[9] Contrary to petitioner's assertion (Pet. 5), the $10,000 limitation of the Tucker Act, 28 U. S. C. 1346 (a) (2), is inapplicable to suits in the district court against the Federal Housing Commissioner. The National Housing Act specifically provides (49 Stat. 722, 12 U. S. C. 1702) that the Commissioner in his official capacity may "sue and be sued in any court of competent jurisdiction, State or Federal." See *Ferguson* v. *Union Nat. Bank of Clarksburg, W. Va.*, 126 F. 2d 753 (C. A. 4), where the court expressly held inapplicable the Tucker Act limitation to this type of suit; see, also, *George H. Evans & Co.* v. *United States*, 169 F. 2d 500 (C. A. 3).

Washington, D. C., as acting Commissioner of the Federal Housing Administration" (R. App. 9), and jurisdiction in the state court was obtained by attachment in Hillsborough County, New Hampshire, of real estate owned by the United States and held by the Commissioner in his official capacity (R. App. 11).

Moreover, the action could also have been brought originally in the district court under 28 U. S. C. 1331, *supra*, p. 3 (and thus properly removable under the general removal statute), since it involved an action arising under the "laws" of the United States (the National Housing Act) and the matter in controversy exceeded the sum of $3,000. See *Perpetual Building & Loan Ass'n., et al.* v. *Series Directors, et al.*, 217 F. 2d 1 (C. A. 4), certiorari denied, 349 U. S. 911 (12 U. S. C. 1716 (c)) *Machine Tool & Equipment Corp.* v. *R. F. C.*, 131 F. 2d 547 (C. A. 9) (15 U. S. C. 603 (a)); *Sabin* v. *H. O. L. C.*, 147 F. 2d 653 (C. A. 10), certiorari denied, 326 U. S. 759 (12 U. S. C. 1463 (a)); *James River Apartments, Inc.* v. *Federal Housing Administration*, 136 F. Supp. 24 (D. Md.).

Finally, wholly apart from the propriety of removal under the general removal statute, Congress has, in 28 U. S. C. 1442 (a) (1), *supra*, p. 4, specifically provided for the removal of cases of this type, *i. e.*, it clearly involves a "civil action" against an "officer of the United States or any agency thereof" for an "act under color of such office." *Sarner* v. *Mason*, 228 F. 2d 176 (C. A. 3), certiorari denied, 351 U. S. 924; *Garden Homes, Inc.* v. *Mason*, 238 F. 2d 651, 654 (C. A. 1); *James River Apartments, Inc.* v. *Federal Housing Administration*, 136 F. Supp. 24

(D. Md.); see Hart & Wechsler, *The Federal Courts and the Federal System* (1953), 1147–1148. Unquestionably, the action was properly removable.[10]

2. The district court's dismissal of petitioner's complaint with prejudice did not, as the Court of Appeals properly ruled, constitute an abuse of discretion.

After its attempted appeal from various interlocutory orders had been dismissed, petitioner was finally notified by letter dated January 14, 1957, that the case would be tried in the district court at Concord, New Hampshire, on March 4, 1957 (R. 2). On February 16, 1957, approximately one month after receiving notice of trial, petitioner's counsel, whose office is in Somerville, Massachusetts, called the clerk of the court and informed him that the March 4th date would not be convenient (R. 30). At first, the court indicated that the date of trial would not be changed (R. 30); however, by letter dated February 26, 1957, petitioner was notified that the trial would be postponed to March 5, 1957 (R. 31). By letter dated March 1, 1957, petitioner was advised of a second postponement of the trial to March 6, 1957 (R. 32). Instead of calling (as he had previously done), sending a wire, or immediately mailing a letter to the clerk, advising of the inconvenience of the March 6th

[10] Petitioner also asserts (Pet. 6) that the federal court could not acquire jurisdiction upon removal because the state court did not have jurisdiction. This statement is difficult to understand. The court below noted (Pet. App. B 12): "The basis for this contention is allegedly an inadequate service of process. The exact basis is not too clear in the record, but appears to be failure after attachment of the property properly to notify the defendant thereof. This defect, if it existed, is a waivable one, and clearly defendant has waived it."

date, counsel for petitioner, who had consistently refused to associate himself with a member of the district court's bar (as required by the court's rules, see *supra*, p. 9, fn. 6), by letter dated March 5, 1957, informed the court that he would be appearing before the Supreme Judicial Court of Massachusetts on March 6, 1957, and therefore could not be present for trial (R. 33). This letter was not received by the clerk until the afternoon of March 6, 1957 (R. 33); that morning, no counsel having appeared for petitioner, the district court granted the Government's oral motion to dismiss with prejudice. The failure of petitioner's counsel to appear in court on that date,[11] and the cavalier manner in which he informed the court of his other engagement, was but the last of a series of actions demonstrating petitioner's total lack of concern in having its case diligently prosecuted, or in complying with the rules of court.[12] The record, as we noted above, *supra*, pp. 9, 11, is replete with numerous repetitive motions filed by petitioner, all designed to avoid trial. Its earlier abortive appeal from various interlocutory orders was further indication of petitioner's desire to delay adjudication on the merits (see R. App.

---

[11] As noted above, *supra*, p. 9, petitioner's counsel had once before failed to appear before the same trial judge at the hearing in connection with the various motions he had filed.

[12] In this connection it should also be noted that, on its first appeal (*Garden Homes, Inc.* v. *Mason*, 238 F. 2d 654 (C. A. 1)), petitioner failed to file a bond for costs as required by Rule 73 (c) of the Federal Rules of Civil Procedure. The court denied the Government's motion to dismiss, and allowed petitioner to file out of time. On this appeal, petitioner, for the second time, failed to file a bond within the proper time, and was again granted leave for late filing.

49–50 for the ten listed orders from which petitioner sought appeal). And, in view of the entire background of this litigation, the trial judge, who had lived with this case from the outset, was justified in dismissing the complaint with prejudice when petitioner's counsel failed to appear.[13]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
SAMUEL D. SLADE,
SEYMOUR FARBER,
Attorneys.

FEBRUARY 1958.

---

[13] The formal judgment of dismissal was not entered until March 14, 1957 (R. 24). Petitioner did not file a motion under Rule 60 (b) of the Federal Rules of Civil Procedure and attempt to seek relief, on grounds of "mistake, inadvertence, surprise, or excusable neglect," from the effect of the final judgment.

U. S. GOVERNMENT PRINTING OFFICE: 1958